

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 8, 2018**

Sheila T. Reiff  
Clerk of Court of Appeals

**NOTICE**

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2016AP987-CR**

**Cir. Ct. No. 2013CF480**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**TODD R. HAMANN,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Jefferson County: DAVID WAMBACH, Judge. *Affirmed.*

Before Kloppenburg, Fitzpatrick and Stark, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Todd Hamann appeals a judgment of conviction and an order denying his motion for postconviction relief. He argues that he is

entitled to resentencing because the circuit court failed to disclose information that he contends may have affected the court's sentencing decision and that his due process rights were violated because the judge was biased. Hamann also asserts that the court erroneously exercised its discretion in sentencing him to what Hamann contends was an excessive and disproportionate sentence. We affirm.

¶2 Hamann pled no contest to one count of homicide by intoxicated use of a vehicle, based on a single-vehicle incident in which his wife, a passenger on Hamann's motorcycle, was killed. The circuit court imposed a sentence of six years of initial confinement and two years of extended supervision. Hamann filed a postconviction motion that the court denied. All of Hamann's arguments on appeal relate to sentencing.

¶3 We first address Hamann's argument that he is entitled to resentencing because the circuit court judge failed to disclose certain information in advance of sentencing. Specifically, he argues that the judge failed to disclose his attendance the night before sentencing at a victim impact panel at which drunk driving was discussed, and failed to disclose that, like Hamann, the judge was previously the driver in a motorcycle incident that took the life of his partner.

¶4 Hamann is vague about the legal theory that would support substantive relief to a party based on a judge's failure to disclose such information. Hamann cites provisions of the Wisconsin and American Bar Association judicial ethics rules, but he does not provide any case law holding that a judge's violation of the rule regarding disclosure, by itself, is a due process violation or a basis for substantive relief.

¶5 The closest approach Hamann makes to an argument on this point is his reliance on *Listecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731

(7<sup>th</sup> Cir. 2015). He asserts that in *Listecki* the court “held” that the judge should have notified counsel and the parties of his personal connection to the case, and “further held” that, if requested, the judge would have had to recuse himself.

¶6 *Listecki* does not help Hamann for two reasons. First, as the State points out, the court in that case did not actually decide the disclosure and recusal issues and did not order relief for any party on these grounds. *Id.* at 750. Instead, the court began its discussion of one party’s recusal motion by stating: “Because we have vacated the summary judgment order and the case shall be assigned to a new judge on remand, we need not reach the merits of the Committee’s motion. However, because the case will be remanded, we briefly note recusal considerations.” *Id.*

¶7 Second, the sources of law that *Listecki* relied on to “note recusal considerations” are not applicable in Hamann’s case. *Id.* The opinion relied on a federal statute regarding judicial disqualification (28 U.S.C. § 455) and federal judicial ethics rules. *Listecki*, 780 F.3d at 750-51. If there is an applicable disqualification statute in Hamann’s case, it would likely be the analogous Wisconsin statute, WIS. STAT. § 757.19 (2015-16).<sup>1</sup> However, Hamann does not cite the Wisconsin statute or develop any argument based on it.

¶8 For these reasons, we conclude that Hamann has failed to establish that a judge’s non-disclosure of information is a basis for resentencing.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶9 We next turn to Hamann’s argument that the judge should have recused himself based on the judge’s attendance at the victim impact panel and the judge’s prior vehicle incident. We do not regard the issue as properly framed in terms of recusal or disqualification. As we stated, there is a Wisconsin statute on disqualification, but Hamann does not cite it.

¶10 Instead, Hamann relies on due process law. Accordingly, the issue is more properly framed as whether Hamann is entitled to resentencing because he was sentenced by a judge who was not impartial. More specifically, the question is whether there was an appearance of bias that reveals a great risk of actual bias. *See State v. Herrmann*, 2015 WI 84, ¶46, 364 Wis. 2d 336, 867 N.W.2d 772. For this issue, we separately address the victim impact panel and the prior vehicle incident.

¶11 As to the victim impact panel, the judge made several references during sentencing to his attendance at that event the night before the sentencing hearing. The judge described the panel as a place where victims of intoxicated driving meet with offenders. The judge noted that one of the speakers was an offender who had killed someone. As described by the judge, the speaker stated, “persons who consume alcohol until they’re impaired and then drive are selfish at their core.” The judge then went on to state that prison is one of the ways to reach a selfish person.

¶12 Hamann assumes that the passage regarding prison was the judge’s description of what the speaker said. However, that is not clear from the transcript, and the judge may only have been describing his own view. Regardless, Hamann appears to argue that the problem with the judge’s attendance

at the victim impact panel lies in the fact that the judge was “influenced” by the “[p]rivate conversations” at the panel.

¶13 Judges do not, and cannot, arrive on the bench devoid of beliefs or opinions that have been shaped by their life experiences and input from others. Hamann does not explain in what sense this particular form of outside input led to beliefs or opinions that should be considered a form of bias. This is not a case of ex parte communication and Hamann’s characterization of the victim impact panel as a private conversation is off the mark. The judge’s comments did not indicate he was familiar with Hamann’s case or had prejudged the matter. The judge reflected upon the victim impact panel speaker’s comments to express concerns about drunk driving in general and to give context to his decision. The concepts discussed by the victim impact panel speaker were not novel or unusual. The judge’s comments do not show appearance of bias or create a risk of actual bias.

¶14 Turning to the judge’s prior vehicle incident, on appeal Hamann relies in part on the concept of “mortality salience.” He cites a legal article and a study in support of the proposition that judges who are reminded of their own mortality make more punitive judgments. He asserts that in his case the judge’s prior incident may have had that effect. However, Hamann did not make this argument in circuit court, and we decline to address it further here. *See State Farm Mut. Auto. Ins. Co. v. Hunt*, 2014 WI App 115, ¶32, 358 Wis. 2d 379, 856 N.W.2d 633 (arguments raised for first time on appeal are generally deemed forfeited).

¶15 Beyond that, Hamann is vague about how the judge’s prior incident created an appearance or risk of bias. His argument uses only phrases like “similar personal experiences which could affect a judge’s decision making.”

¶16 The judge's reference to his loss of his partner in the vehicle incident came immediately after Hamann's allocution, during which Hamann described his pain at losing his wife. Given their context, it is clear the judge's remarks were intended only to convey empathy for Hamann's loss. The remainder of the judge's sentencing comments provides no support for Hamann's claim that the judge's prior incident affected the sentencing process. The judge focused on the factors properly relevant to sentencing, and did not refer to his incident again. Hamann fails to show that the judge's experience created an appearance of bias or great risk of actual bias.

¶17 Hamann next argues that in imposing the sentence the circuit court erroneously exercised its discretion by placing excessive emphasis on retribution and deterrence, resulting in a sentence that was unduly harsh, excessive, and disproportionate. The standards for the circuit court and this court on sentencing issues are well established and need not be repeated here. *See State v. Gallion*, 2004 WI 42, ¶¶17-51, 270 Wis. 2d 535, 678 N.W.2d 197.

¶18 In making this argument, Hamann ignores our standard of review and the record. The circuit court considered the *Gallion* factors and the possibility of probation. In considering the wide societal impact of the crime and its severity, the court concluded that the goals of retribution and deterrence were of primary importance. It was free to do so. The court further concluded that it would be unfair to sentence Hamann more leniently because he was a businessperson, father, and upstanding community member. He committed a crime and punishment was necessary. The court recognized the damage that could occur by sending Hamann to prison and considered probation but decided that it was not appropriate here given the gravity of the offense.

¶19 The circuit court imposed a sentence well within the maximum. It is therefore presumed to be reasonable and not excessive or shocking to the public sentiment. *State v. Grindemann*, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507. The court explained why it was imposing a short period of extended supervision and six years of initial confinement.

¶20 Although Hamann disagrees with the circuit court's analysis, and a different judge may have reached a different conclusion, that is not our standard of review. The court considered the proper factors and explained the goals and basis for its sentence. Its sentence was legally permissible. We must affirm its exercise of discretion.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

